

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5**

L.I.F.E., INC.

Employer

and

Case 5-RC-15451

THE MID-ATLANTIC COMMUNITY BASED  
HEALTHCARE WORKERS ASSOCIATION, L.L.C.

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held on September 12 and 13, 2002, before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The parties stipulated and I find that: L.I.F.E., Inc., a Maryland corporation, is engaged in the business of providing residential services to developmentally disabled adults at facilities located in the City of Baltimore, Baltimore County, and Howard County, Maryland. During the past twelve months, a representative period, the Employer derived gross revenues in excess of \$250,000 from these business operations and purchased and received products, goods,

and materials valued in excess of \$5,000 at its facilities directly from points located outside the State of Maryland.

The Employer disputes that The Mid-Atlantic Community Based Healthcare Workers Association, L.L.C. (Petitioner) is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (the Act). Based on the criteria and reasons set forth below, I find that the Petitioner is a labor organization under Section 2(5) of the Act.

Section 2(5) of the Act defines a labor organization as follows:

Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employer concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

Pursuant to Section 2(5) of the Act, only two requirements must be met to establish labor organization status: (i) that it be an organization in which employees participate; and (ii) that it exists for the purpose, in whole or in part, of dealing with employers concerning wages, hours and other terms and conditions of employment. *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851-52 (1962).

The Employer contends that the lack of employee involvement in the Petitioner's organization requires a finding that the Petitioner is not a labor organization within the meaning of Section 2(5) of the Act. However, the Employer's contention is premature based on the assurances at the hearing that the Petitioner exists for dealing with employers concerning wages and other working conditions and, if chosen to be the bargaining representative of a group of employees, will have employee participation. See *Gino Morena Enterprises*, 181 NLRB 808 (1970). Further, that the Petitioner lacks a constitution, by-laws, dues, or other formal structure does not support the Employer's contention that the Petitioner is not a labor organization. See *Columbia Transit Corp.*, 237 NLRB 1196 (1978); *Arkay Packaging*, 221 NLRB 99 (1975); *Lane Aviation Corp.*, 211 NLRB 824 (1974). Therefore, based on the foregoing, I find that the Petitioner is a Section 2(5) labor organization because the organization exists for the purpose, at least in part, of dealing with the Employer concerning, wages, hours, labor disputes, and other working conditions.<sup>1</sup>

The Petitioner filed a petition seeking to represent employees in the following unit, which would include approximately 91 employees:

All community-based rehabilitation counselors, direct care workers and all staff responsible for direct hands-on care of disabled; but excluding administrative staff, office staff, non-direct care workers and all other employees.

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<sup>1</sup> Consequently, any certification which may come about as a result of this proceeding is subject to revocation upon a showing that the Petitioner has not complied with its statutory duties relating to adequate representation and membership rights in behalf of the proposed unit of employees. *Gino Morena Enterprises*, supra.

Petitioner also would include “med runners” and all full time, part time and weekend employees in the unit of employees it seeks to represent.

The Employer contends that should an election be directed, an appropriate unit would consist of the following, which total approximately 83 employees:

All full time and regular part time direct care employees, maintenance and janitorial employees, including community living assistants/counselors, residential supervisors and med runners employed at the Employer’s community-based rehabilitation and living facilities in Baltimore City, Baltimore County and Howard County, Maryland; excluding office clerical employees, medical secretary, administrative employees, employees employed by other employers, lead residential supervisors, program coordinators, quality assurance technicians, guards and supervisors as defined in the Act.

The parties are in agreement that residential supervisors, community living assistants and “subs” or substitutes should be included in any unit found to be appropriate. The parties further agree that office clerical employees, medical secretaries, administrative employees, program coordinators, quality assurance technicians and employees employed by other employees<sup>2</sup> should be excluded from the any unit found to be appropriate. In addition, CEO and president Paul (Tom) Noto, deputy director Charlton Chance, program director John Callahan, and deputy or assistant program director Teresa Forrest, are not in dispute. Therefore, the only classifications in dispute are lead residential supervisors and maintenance and janitorial employees.

The parties agree there is no contract bar, or any other bars, to an election. There is no history of collective bargaining between the Petitioner and the Employer with respect to the above-described petitioned-for Unit.

At the hearing, the Employer presented testimony from president Tom Noto, lead residential supervisors Ebony Parris-Johnson, Janice Williams, and Janice Wilson, and human resources generalist Camille Williams. The Petitioner presented former lead residential supervisor Glendene Hilton for testimony.

## **I. DISPUTED ISSUES**

Whether lead residential supervisors are supervisors within the meaning of Section 2(11) of the Act.

Whether the maintenance employees and janitor share a community of interest with the petitioned-for Unit employees sufficient to be included in the unit found to be appropriate here.

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<sup>2</sup> The Employer explained that it does not seek to exclude those employees employed by the Employer but who also might be employed by another employer. With this clarification, the Petitioner did not dispute the exclusion.

## II. POSITIONS OF THE PARTIES

### PETITIONER

The Petitioner asserts that the lead residential supervisors are not supervisors within the meaning of the Act, and the two maintenance employees and janitor do not share a sufficient community of interest with the other petitioned-for Unit employees. The Petitioner, therefore, contends that those classifications should be excluded from any unit found to be appropriate.

### EMPLOYER

The Employer asserts that the lead residential supervisors are statutory supervisors as they have the authority to discipline, discharge, hire, assign, reward and responsibly direct employees within the meaning of Section 2(11) of the Act. Thus, the Employer contends the lead residential supervisors should be excluded from any appropriate unit. Further, the Employer asserts that the janitor and two maintenance employees share a sufficient community of interest with the other petitioned-for employees and, thus, should be included in the unit found to be appropriate.

Based on the record as a whole and the reasons stated below, I find that the lead residential supervisors are supervisors within the meaning of Section 2(11) of the Act, and that the maintenance employees and janitor must be included in the appropriate unit found here.

## III. FACTUAL SUMMARY

### A. EMPLOYER'S OPERATIONS

#### Overview

The Employer provides residential services for developmentally disabled adults in alternative living units (ALUs) and group homes<sup>3</sup> (hereinafter collectively referred to as "homes" or "units") located throughout the City of Baltimore, Baltimore County and Howard County in the State of Maryland. The Employer's administrative office is located in Catonsville, Maryland and houses CEO and president Tom Noto, deputy director Charlton Chance, program director John Callahan, deputy program director Teresa Forrest, and administrative and clerical staff.<sup>4</sup> The Employer operates 28 homes total.<sup>5</sup> Twenty-four homes have more than one client and four homes have only a single client. The Employer is funded by the State of Maryland

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<sup>3</sup> A group home houses four clients while an ALU houses from one-three clients.

<sup>4</sup> No employee in the petitioned-for unit, and none of the disputed individuals, except for the janitor, work at the Catonsville facility. The janitor works at the Catonsville facility about four hours a day.

<sup>5</sup> The Employer also has employees providing direct care in three community support living arrangements (CSLAs). Noto testified that the primary difference between a CSLA and an ALU is that the home itself is owned or leased by the client. Thus, the home itself is not licensed by the State, but the Employer is licensed to provide its service. Noto further testified that the duties of a CSLA employee differs from other employees because the client typically has more diverse needs. For example, one client is a quadriplegic who needs 40 hours of service a week. The record is silent as to how many employees work in CSLAs.

Developmental Disabilities Administration, which is part of the State Department of Health and Mental Hygiene.

The Employer provides full residential services to their clients, which includes room, board, medical attention, and activities, such as taking clients to the movies or the park. The Employer also takes part in a client's psychological and nutritional evaluations. In short, the Employer assists the client with any necessary daily living activities. Most of the homes operated by the Employer are staffed 24 hours a day with around-the-clock "awake" staff, or with staff that actually live in the homes with the clients. The Employer also has 24-hour supervision where the staff employee sleeps at the home during traditional sleeping hours. The Employer operates three shifts: 7:00 a.m.-3:00 p.m., 3:00-11:00 p.m., and 11:00 p.m.-7:00 a.m. The type of staffing depends on the need of the client. The Employer tries to group clients based on their functioning level.

Staffing requirements are established as part of a client's "IP" or individual program. A client's individual program is created by a team of individuals consisting of the client, residential provider, day program provider, service coordinator, and any other person felt by the team to be necessary, such as a physician, psychiatrist, an interested party, an advocate or whomever the client may want on the team. The team develops a unified program for the client based on the needs and desires of the client. The program includes the level of supervision needed by the individual.

### Hierarchy

The Employer's president, Noto, his deputy, and the two program directors, Callahan and Forrest, work at the Employer's administrative office. The Employer also has two program coordinators (also referred to as "coordinators") who also work in the administrative office. The coordinators oversee five to seven homes apiece and report to the program directors. The Employer has four classifications of employees who provide direct care: lead residential supervisors (lead supervisors); residential supervisors; community living assistants, who tend to provide overnight, "awake" and weekend service; and substitutes.

The lead supervisor position was created about one year ago. The Employer contends that lead supervisors serve as the first level of management. Prior to the creation of this position, the Employer's first level of management was the program coordinator. The coordinator was responsible for six to seven homes and for ensuring that those homes were fully staffed, followed state regulations, met client's needs, and supervised the staff. The Employer normally employed four or five coordinators. Since the creation of the lead supervisor position, as noted above, there are only two coordinators who are responsible for five to seven homes each.<sup>6</sup> Currently, there are eleven lead supervisors, ten of whom have one home each and one who is responsible for four single-client homes. The lead supervisors are typically promoted from the residential supervisor position and are required to have at least a high school education.<sup>7</sup> Lead supervisors do not work in homes that are overseen by a coordinator, nor do they normally work with

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<sup>6</sup> Noto testified that because the lead supervisor position is relatively new, the coordinators have been asked to assist lead supervisors with certain technical skills, such as writing individual programs.

<sup>7</sup> By contrast, both the coordinators have college degrees.

residential supervisors in the same home. The lead supervisors report to the program directors, as do the coordinators. Units operated by a coordinator typically have a residential supervisor, who reports to the coordinator.

According to Employer witnesses, lead supervisors have the authority to hire and schedule their staff; discipline, including suspend and discharge, employees; and evaluate and issue bonuses to employees.<sup>8</sup> Lead supervisors are responsible for assisting in the development of a client's individual program and making sure the clients receive the necessary medical attention. They are also responsible for making sure the home is clean and hazard-free; the unit vehicle is in good repair; and for communicating with the client's physicians or psychologists or whoever else is involved in the client's program. Lead supervisors, as well as coordinators, are responsible for training new employees.

Lead supervisors typically work from Monday through Friday, 3:00 p.m.-11:00 p.m., normally by themselves or with another staff member. The number of direct staff employees under the supervision of a lead supervisor varies depending on the needs of the client. For example, lead supervisor Janice Williams testified that her staff ranges from one to four employees<sup>9</sup> while lead supervisor Janice Wilson has twelve staffers, with two staff members on duty at all times. Lead supervisors also work during their non-shift hours since they are responsible for making sure their homes are staffed and operating properly. They normally drop by their homes on either Saturday or Sunday to check on their staff and the clients. Lead supervisors have pagers and can be called 24 hours per day. For example, Parris-Johnson said she has been paged to get keys to the home for one of her staff, to arrange for a med runner to pick up one of her clients and to deal with a difficult client.

Lead supervisors are also responsible for keeping track of documentation related to client care. The Employer utilizes unit inspection forms to evaluate the quality of care being provided in the unit. The coordinators, lead supervisors, and quality assurance staff are responsible for completing these forms on a weekly basis. Lead supervisors are also responsible for making sure that the medication administration records (MARs), which chart medications given to the clients and client bowel movements, are completed. If the form is not filled out correctly, the reviewing nurse sends the form back to the lead supervisor. It is the lead supervisor's responsibility to make sure the staff that erred makes the necessary corrections.

Lead supervisors also attend management meetings that are held weekly on Wednesdays at the Catonsville office. The program directors, coordinators, and Noto also attend these meetings. Program director Callahan generally leads the meetings, and Noto also makes presentations. Lead supervisors receive various training at these meetings and company business and any problems with the homes are discussed.

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<sup>8</sup> The job description for a lead supervisor indicates that the lead supervisor "[h]ires, trains, supervises, evaluates and terminates (when necessary) direct care staff ... with the consent of their supervisor." Noto testified, however, that he has informed the lead supervisors that they can take such actions without the consent of their supervisor.

<sup>9</sup> J. Williams explained that she has a weekend staff that ranges from one to four employees, and one full-time employee that when absent, J. Williams will have one to four staff members cover the employee's shift.

Noto testified that the lead supervisors have similar responsibilities as the coordinators; the difference being that the lead supervisor is typically only responsible for one home while the coordinators have five to seven homes. Noto also testified that the duties of a lead supervisor and residential supervisor are also similar. The residential supervisor, however, is supervised by a coordinator, who is ultimately responsible for the home and the client. Residential supervisors typically work 3:00 p.m.-11:00 p.m. They may be by themselves during their shifts or with one other staff members. Residential supervisors have no responsibility to come in on the weekends. Residential supervisors do not have pagers. Noto testified residential supervisors are responsible for assigning tasks to part-time staff members and making sure they are performed; if those tasks are not performed, they are to report it to the coordinator. Noto said in practice the coordinator or quality assurance staff normally catches when a task has not been performed during their checks of the home. According to Noto, residential supervisors do not have the authority to discipline or discharge employees, but they can make a recommendation of discipline to the coordinator. However, Noto testified it would be totally up to the coordinator to make the decision whether to issue the discipline.

Lead supervisors also share some of the same responsibilities as the direct care staff, including client hygiene, transporting clients to/from activities and medical appointments, and handling client medical needs. Indeed, lead supervisor Parris-Johnson testified that she spends about six hours, or 60-70 percent of her time, providing direct care to the clients.

Camille Williams serves as the Employer's human resources generalist.<sup>10</sup> C. Williams, along with her receptionist, comprise the Employer's human resources department. They maintain employee personnel files, and C. Williams processes disciplinary actions and employee bonuses. C. Williams testified that she plays no part in issuing discipline.

The Employer also employs a scheduler, Joyce Cates, who is responsible for preparing the schedule and timekeeping.<sup>11</sup> The Employer utilizes a remote computer system to which employees call in to essentially "punch in" at work. Noto testified that if a lead supervisor were too busy with direct care or administrative work, she would ask Cates to help her with scheduling issues, such as finding staff to fill a vacancy or transport a client. Cates also performs other tasks for the Employer, but her main responsibility is benefits.

### Wages and Benefits

Noto establishes wage rates and increases and the fringe benefit package in consultation with his controller and Board of Directors. Program coordinators are paid \$35,000 annually. Lead supervisors are paid \$8.50 an hour plus an additional \$5,000 over 26 installments.<sup>12</sup> Residential supervisors and other direct care staff are paid \$8.00 and \$7.00 per hour, respectively. All employees receive the same fringe benefit package.

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<sup>10</sup> Neither party seeks to include Williams or the human resource generalist position in an appropriate unit.

<sup>11</sup> Neither party seeks to include Cates or the scheduler position in an appropriate unit.

<sup>12</sup> Noto explained that the \$5,000 was derived from dividing \$35,000 (annual salary for the coordinators) by 7 (the typical number of homes under a coordinator), since the lead supervisor normally is in charge of a single unit.

## B. LEAD SUPERVISORS' AUTHORITY

### Hiring

The Employer's human resources department initially handles the application and screening process, which includes an interview, obtaining fingerprints, and conducting a background investigation. If the applicant passes the initial interview, she is then sent to either a coordinator or lead supervisor for an interview depending on where the vacancy exists. According to Noto, the decision to hire would be made by the program coordinator or lead supervisor.

Lead supervisor Parris-Johnson testified that she has hired one full-time employee. After the employee met with C. Williams, she met with Parris-Johnson who reviewed her application and set up an appointment to have her come to the unit. After the employee visited the unit, Parris-Johnson hired her. Parris-Johnson also testified about an instance where she rejected an applicant. She said after she reviewed the application, she told human resources to have the applicant come see her. Human resource generalist Camille Williams had interviewed the applicant initially. Parris-Johnson said she interviewed the applicant for three hours but discovered that the work hours the applicant desired did not meet her needs. She then sent the application back to C. Williams and told her that the applicant was not suitable for her unit.<sup>13</sup>

Petitioner witness and former lead supervisor, Glendene Hilton, testified that the lead supervisors were told by Noto that they could hire, fire, and discipline their staff. However, Hilton testified that she did not hire any of her staff, nor did anyone ask her whether she wanted certain employees to work in her homes.<sup>14</sup> Hilton said she did conduct interviews, but sometimes staff that she had not interviewed would just show up at her home to work. Hilton testified that other lead supervisors have told her about new hires coming to their homes to work without their prior knowledge.

### Discipline

Employer witnesses testified that lead supervisors have the authority to issue written warnings to, and can suspend and terminate, employees without prior authorization from a higher authority.<sup>15</sup> Noto testified that during the Wednesday meetings, he has indicated to his staff that he would prefer that the supervisor talk to the employee, human resources, and/or the program director before terminating an employee. However, Noto further testified that his only instruction to the lead supervisors is that before they terminate an employee they have human resources complete the necessary paperwork and that the proper procedure be followed. Noto said that he is not aware of whether lead supervisors actually contact human resources before terminating an employee.

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<sup>13</sup> The application reflects that the lead supervisor rejected the applicant for employment.

<sup>14</sup> Hilton worked as a lead supervisor for the Employer from about August 2001 to August 29, 2002. Hilton said she left the Employer because of, among other things, pay issues. Hilton was in charge of two homes as a lead supervisor.

<sup>15</sup> Lead supervisor Janice Williams testified that the Employer's discipline policy is as follows: verbal warning, written warning, and then after three warnings for the same offense, the employee could be suspended.



The Employer presented numerous examples of disciplinary warnings issued by lead supervisors. For example, Parris-Johnson testified that she issued a written warning to an employee for committing numerous errors in administering medication. She discovered the errors after reviewing the "med books" and also after she conducted an investigation of the matter, which included talking to the client. Parris-Johnson testified that she issued the warning to the employee without prior instruction from anyone. Subsequently, in August 2002, Parris-Johnson took the same employee off of the schedule until the employee completed a medication administration course because of errors in administering medication. Parris-Johnson said prior to suspending the employee, she discussed the action with the two program directors, Callahan and Forrest. Parris-Johnson said she told them that she wanted to suspend the employee until the employee retakes the course and the program directors told her to do the necessary paperwork. Parris-Johnson testified that she then issued to the employee by herself the suspension letter, which is only signed by her.

Lead supervisor Janice Williams testified that she has issued several written warnings to the same employee over a variety of transgressions, including unsatisfactory work quality, violating safety rules, medication errors, and failing to give proper care to the clients. Williams, who works by herself during her shift, said she received complaints from the clients concerning this particular employee and then dropped by the home and observed the employee in violation of the Employer's rules. On each occasion J. Williams said she met with the employee and issued the warnings. She said that no other supervisor was consulted regarding her decision to issue the warnings. In general, J. Williams said she takes the action first, and then gives copies of the warnings to the employee, C. Williams, and her supervisor. She has never recommended that an employee be suspended or terminated.

Lead supervisor Janice Wilson testified about her ability to terminate and suspend employees. Wilson testified that in February 2002, she issued a letter to human resources stating she no longer wanted an employee to work at her home because the employee had abandoned her shift. Later that month, C. Williams issued a termination letter, signed by her, to the employee for job abandonment. However, Wilson said it was she who determined that the employee should be fired. Wilson also testified that she suspended an employee for two nights in September 2002, after the employee had failed to supervise a client and the client got on the incorrect van. Wilson provided extensive testimony about several other warnings that she issued to employees for violations ranging from lateness to failing to administer medications properly.

Petitioner witness Hilton also testified she had issued written warnings as a lead supervisor, including warnings to an employee for braiding her daughter's hair in the home and to another employee for failing to have her drivers license. However, Hilton said she did not issue discipline without prior authorization. Hilton said she would take the written warning to the administrative office, seemingly for review, and then she would issue the warning to the employee herself. For example, Hilton said she wrote up a particular female employee for multiple transgressions – misusing petty cash, lateness, and client problems. Hilton said that she would go to program director Teresa Forrest after she completed the written warning, and Forrest would review it. Forrest would then ask Hilton whether she felt comfortable giving it to the employee and Hilton said "yes." Hilton would then issue the warning to the employee, many times by herself but sometimes with Forrest, who also came out to the home four or five times to

consult the employee. Hilton said she recommended to Forrest that the employee be suspended, and Forrest told her to do what she has to do. But the employee was never suspended and when Hilton asked the reason, she was told that there would not be anyone left to work in the unit.<sup>16</sup>

In general, Hilton testified that she would write the warning, call C. Williams to tell her about it, and C. Williams would then call the employee. When Hilton found out that two employees had taken clients to a baby shower, she called C. Williams who told the employees to come to the office. C. Williams, Hilton, and program director Teresa Forrest then met with the two employees. Hilton testified that she issued warnings to both employees, but it is unclear from the record whether she did so prior to or as a result of this meeting. In one instance, the employee refused to sign a written warning. Hilton said she called C. Williams who then talked to the employee, but the employee still refused to sign the warning. Hilton noted on the warning that the employee refused to sign it and sent C. Williams a copy. Hilton said C. Williams signed off on the warning and sent it back to Hilton, who then issued it to the employee.

#### Assigning/Scheduling Employees

Lead supervisors are responsible for ensuring that their homes are fully staffed. In this regard, Employer witnesses testified that lead supervisors schedule employees whenever there is a vacancy in their home. The lead supervisors receive a schedule every week for all of the units. The schedule indicates which permanent staff, full time and part time, are working and if there are any vacant shifts. Lead supervisors also received a roster with employee names and phone numbers. If there is a vacant shift, the lead supervisors check the schedule and roster and may call employees directly to try and fill the vacancy. Lead supervisors may also call in staff to work when they have to fill a shift because someone called out at the last minute or if a client is home during the day. Joyce Cates, the Employer's scheduler, also assists lead supervisors in getting employees for vacant shifts. The Employer discourages the use of overtime, but lead supervisors can schedule an employee in overtime status without prior approval from a higher authority.

For example, lead supervisor Parris-Johnson testified that she has only one permanent staff member, who works Wednesday through Saturday on the overnight shift.<sup>17</sup> When Parris-Johnson receives the schedule for her unit, her permanent employee will be on the schedule. The other shifts for her home have to be filled. Sometimes Parris-Johnson notifies Cates in advance of whom she wants to be put on the schedule. However, Cates sometimes places persons on the schedule without a call from Parris-Johnson. If a shift needs to be filled, Parris-Johnson may call employees or she may give Cates the names of the employees she desires and Cates will call them. Parris-Johnson further testified that if she sees someone scheduled for her unit that she does not want, she will let Cates know and Cates will change the schedule. In this regard, Parris-Johnson said that recently, a staff employee whom she had a problem with was going to be put in her unit by Cates. Parris-Johnson told Cates she did not want the employee back in her unit, and the employee has not been back.

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<sup>16</sup> Because of this problem employee, Hilton no longer wanted to be lead supervisor for this particular unit and she was later taken off of that unit.

<sup>17</sup> Parris-Johnson testified that she supervises three to five employees depending on the shift.

Petitioner witness Hilton testified that she did not independently schedule staff for her unit, that scheduler Joyce Cates did the scheduling and set up medical appointments for clients. Hilton said in one instance, she felt that an employee was not ready to be put on the schedule, and Cates told her that she would be on the schedule. Hilton did say that she was given a roster when she became a lead supervisor, and that she used that roster to schedule employees when staff called out at the last minute. However, Hilton said she would often fill the shift herself.

### Evaluations/Rewards

Lead supervisors may reward employees, or recommend that employees be rewarded, with non-monetary bonuses, such as \$25 gift certificates from Hecht's, Blockbuster Video cards, and movie tickets. For example, lead supervisor Parris-Johnson testified that she once recommended to human resources that an employee receive a gift certificate, and the employee was awarded the gift certificate from human resources.<sup>18</sup> Lead supervisor Wilson testified that she recommended that two employees receive gift cards for their performance. Noto testified that lead supervisors can also make a recommendation to him that an employee who has done a fantastic job receive a cash bonus. Indeed, there is evidence that a lead supervisor made a request to Noto that an employee receive a bonus for an "excellent job" and the employee was issued a \$130 dollar bonus. Noto testified that he has never rejected such a recommendation. The record evidence indicates that a lead supervisor issues a letter to C. Williams or Noto requesting that an employee receive a particular bonus, and C. Williams types up the letter and issues the bonus to the employee. C. Williams testified that her role is limited to keeping track of bonuses and typing up the letter so it is issued to the employee in a nice presentation. C. Williams also testified that she is not aware of Noto ever denying a bonus.

For the first year, employee evaluations are completed after 90-days, six months, and at the end of the year. Evaluations are performed annually thereafter. Noto testified that evaluations are not tied to any wage adjustment. Lead supervisors perform evaluations of their direct care staff.

### C. MAINTENANCE EMPLOYEES AND JANITOR

The two maintenance employees are Frank Simpson and Lewis Figuera. They perform light maintenance in the homes, such as moving refrigerators, washing machines, and dryers to clean behind them; changing light bulbs; changing washers in a faucet; painting; and unblocking toilets. Normally, the maintenance employees work from about 7:00-8:00 a.m. until 3:00 p.m., Monday through Friday. They are on call 24 hours per day. Most of their work occurs when the client is out of the home. However, Noto testified that maintenance employees working in the home on a project would come in contact with clients and other Employer staff normally in the morning, before the client leaves for the day for his program, and after 3:00 p.m., when the client arrives home. In addition, lead supervisors or coordinators call Simpson to handle problems in the home, such as blocked toilets.

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<sup>18</sup> The letter issued by human resources generalist C. Williams begins with the statement, "Based on an acknowledgement from your Supervisor we would like to recognize you for going above and beyond the call of duty."

The janitor, Faith Walker, works from 9:00 a.m. to 5:00 p.m. On a daily basis, she performs cleaning in the administrative office from about 9:00 a.m. to 1:00 p.m., and then she is transported to one of the homes to work. Typically, Walker works in the homes of the clients with the most needs, as the staff is busy caring for the client and does not have the opportunity to clean the home. The janitor is paid \$7.00 an hour.

#### IV. ANALYSIS

##### A. STATUS OF LEAD RESIDENTIAL SUPERVISORS

Section 2(3) of the Act excludes from the definition of “employee” “any individual employed as a supervisor.” Section 2(11) defines “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In determining whether a person is a statutory supervisor, the Board examines whether the person in question exercises any of the functions listed in Section 2(11), uses independent judgment in performing any of those supervisory functions, and does so in the interest of management. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives,” and employees, such as “straw bosses, leadmen, set-up men, and other minor supervisory employees,” who enjoy the Act’s protections even though they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Senate Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

In *Kentucky River*, the Supreme Court approved the Board’s well-established precedent that the party asserting supervisory status has the burden of proof to establish such status. *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1867 (2001). Conclusory evidence, “without specific explanation that the [disputed person or classification] in fact exercised independent judgment,” does not establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Furthermore, “whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Applying these criteria to the instant case, I conclude that the lead residential supervisors are supervisors within the meaning of Section 2(11) of the Act. In this regard, the record establishes that they have the authority to issue discipline to employees without prior approval

from a higher authority, and reward employees, or effectively recommend that employees be rewarded, with bonuses using independent judgment.

The record fully establishes that the lead supervisors have the independent authority to issue written warnings to employees and that this authority is exercised on a regular basis. Petitioner mainly relies on the testimony of its witness, Glendene Hilton, in arguing that lead supervisors lack true supervisory authority under the Act. While the record reflects that in some instances a lead supervisor has consulted with upper management during the disciplinary process, there is no evidence that any higher authority conducts an independent investigation prior to the issuance of a written warning by a lead supervisor. Further, although Hilton testified that she met with program director Forrest prior to issuing warnings to an employee, Hilton said that Forrest merely asked her was she comfortable in issuing such warnings, to which Hilton said “yes.” There is no evidence that Forrest conducted her own investigation of the incidents or even gave Hilton a stamp of approval before Hilton issued the warnings to the employee, normally by herself. Moreover, there is ample evidence in the record that lead supervisors have the independent authority to suspend employees. Indeed, lead supervisors Parris-Johnson and Wilson both testified that they have suspended employees without prior approval or without any independent investigation by a higher authority. While Hilton said her recommendation to suspend a problematic employee was not followed, it appears that she was told this because of staffing issues, not because she did not have the authority to suspend employees.

The record also establishes that lead supervisors reward employees, or make effective recommendations that employees be rewarded, with bonuses. There are several examples in the record of a lead supervisor making a request to human resources, or president Noto, that an employee receive a bonus in the form of a gift certificate based on her performance, and the employee being issued such bonus. This is done without Noto or anyone from upper management independently investigating the recommendation. In addition, the record contains evidence that lead supervisors can recommend that employees receive cash bonuses to Noto, who testified that he has never rejected such a recommendation. Indeed, there is evidence that a lead supervisor made a request to Noto that an employee receive a bonus for an “excellent job” and the employee was issued a \$130.00 dollar bonus. Since these bonuses are discretionary, not simply given out on an automatic basis, the rewarding of, or recommendation that employees be rewarded with, these bonuses constitutes independent judgment by the lead supervisors. See, e.g., *Pine Manor Nursing Center*, 270 NLRB 1008 (1984).

Other indicia of supervisory status of lead supervisors are their ability to make effective hiring recommendations and schedule employees, including assigning overtime. Moreover, that the lead supervisors receive a higher rate of pay than any other direct care worker also serves as militating factor in favor of finding supervisory status. See, e.g., *Illini Steel Fabricators*, 197 NLRB 303 (1972); *Grand Union Co.*, 193 NLRB 525 (1971). The Petitioner further argues that the lead supervisors spend a significant amount of their time performing direct care duties, similar to other direct care staff. However, the record here establishes that the lead supervisors possess and actually exercise supervisory authority requiring the use of independent judgment in matters beyond the mere exercise of direct client care. Based on the foregoing, I find that the lead supervisors exercise supervisory authority within the meaning of Section 2(11) of the Act. Therefore, I shall exclude lead supervisors from the unit.

## B. PLACEMENT OF MAINTENANCE EMPLOYEES AND JANITOR

A major determinant in an appropriate unit finding is the community of interests of the employees involved. When the interests of one group of employees are dissimilar from those of another group, a single unit is inappropriate. *Swift & Co.*, 129 NLRB 1391 (1961). But the fact that two or more groups of employees engage in different processes does not by itself render a combined unit inappropriate if there is a sufficient community of interest among all these employees. *Berea Publishing Co.*, 140 NLRB 516, 518 (1963).

The maintenance employees and janitor, just as the direct care employees, are charged with keeping the units clean and safe for the clients. While there does not appear to be substantial contact among the maintenance employees and janitor and the direct care staff, they all have a hand in the cleaning function and occasionally work side-by-side in the homes. Indeed, the janitor, Faith Walker, typically cleans the homes of the needier clients because the direct care staff is busy caring for the client. Also, the groups of employees share similar working conditions in that they are paid by the hour<sup>19</sup> and all share the same fringe benefits. Significantly, the maintenance employees and janitor, as well as the direct care employees, primarily perform duties not requiring a high degree of skill or specialized training. See, e.g., *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000). Cf. *Four Seasons Nursing Center*, 208 NLRB 403 (1974). Moreover, the exclusion of the maintenance employees and janitor would result in them being the only unrepresented non-clerical employees of the Employer. Based on the community of interest factors set forth above, I find the maintenance employees and the janitor would not constitute a separate appropriate unit. Accordingly, I find that the maintenance employees and janitor share a community of interest with the other petitioned-for unit employees sufficient to require their inclusion in the unit.

## V. UNIT CONCLUSIONS

Based on the foregoing, the record as a whole, and careful consideration of the arguments of the parties at the hearing and in brief, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

All full time and regular part time maintenance and janitorial employees and direct care employees, including community living assistants/counselors, residential supervisors, substitutes, and med runners employed at the Employer's community-based rehabilitation and living facilities in Baltimore City, Baltimore County, and Howard County, Maryland; excluding all other employees, professional employees, office clerical employees, medical secretaries, administrative employees, employees employed by other employers, lead residential supervisors, program coordinators, quality assurance technicians, guards, and supervisors as defined in the Act.

Further, I conclude that the *Davison-Paxon* eligibility formula should be applied in this case to the classification of substitute employee and that any substitute who regularly averages

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<sup>19</sup> In fact, the janitor is paid the same amount per hour, \$7.00 dollars, as the non-supervisory direct care staff.

four hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest in the unit and may vote in the election. See *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990); *Davison-Paxon Co.*, 185 NLRB 21 (1970).

### **DIRECTION OF ELECTION**

An Election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the **THE MID-ATLANTIC COMMUNITY BASED HEALTHCARE WORKERS ASSOCIATION, L.L.C.**

### **LIST OF VOTERS**

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by **OCTOBER 15, 2002**.

Dated: **October 1, 2002**

At Baltimore, Maryland

(SEAL)

WAYNE R. GOLD

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Regional Director, Region 5

177-8520-0800  
440-1780-6050